UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

DIETRICH INDUSTRIES, INC.

and

Cases 13–CA–43598
13–CA–43718

LOCAL NO. 142, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

*Lisa Friedheim-Weis* and *Hyeyoung Bang-Thompson, Esqs.*, for the General Counsel.
*Ronald J. Andrykovitch* and *Floyd A. Clutter, Esqs.,* for the Respondent.
*Mr. Richard J. Knipp*, for the Charging Party.

## DECISION

### Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Chicago, Illinois, on March 28 and 29, 2007, pursuant to an amended consolidated complaint that issued on March 30, 2007.[1] The complaint, as further amended, alleges that the Respondent unlawfully locked out striking employees and failed to reinstate them upon their unconditional offer to return to work in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, insisted upon the withdrawal of unfair labor practice charges in violation of Section 8(a)(1), (3) and (5) of the Act, and unilaterally discontinued the health benefits of laid off employees in violation of Section 8(a)(1), (3) and (5) of the Act.[2] The Respondent's answer denies any violation of the Act. I find that the lockout was unlawful and that the failure immediately to reinstate to available positions the strikers who unconditionally offered to return to work violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following[3]

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[1] All dates are in 2006 unless otherwise indicated. The charge in Case No. 13–CA–43598 was filed on September 12. The charge in Case No. 13–CA–43718 was filed on November 13 and was amended on March 14, 2007.
[2] The General Counsel, with the concurrence of the Charging Party, withdrew Case 13–CA–43537 and the corresponding complaint allegation regarding the discontinuation of the health benefits of striking employees on May 5. That case number has been deleted from the caption.
[3] The unopposed motion of the General Counsel to correct the transcript is granted. I have designated the motion, which sets out the corrections, as General Counsel's Exhibit 26. General Counsel's Exhibit 26 is received and has been appended to the record. General Counsel's Exhibit 12, which was identified but inadvertently not offered, is hereby received.

## Findings of Fact

### I. Jurisdiction

The Respondent, Dietrich Industries, Inc., the Company, is a Pennsylvania corporation engaged in the manufacture, sale, and distribution of metal framing products for commercial and residential construction at various locations including its facilities in Hammond, Indiana. The Company annually sells and ships products valued in excess of $50,000 directly to points outside the State of Indiana. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Local No. 142, International Brotherhood of Teamsters, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

*A. Background*

The parties have had a collective bargaining relationship since 1979. Shortly before the expiration of their prior contact, effective through February 28, the parties began negotiating a successor agreement. There were between 60 and 70 employees in the unit.[4] On February 28, the parties agreed to an extension of the existing contract through March 4, and the Company presented a proposal to the Union to be submitted to the members for ratification. The proposal contained two modifications of the prior agreement that were unacceptable to the Union. The first was a “tiered” system that gave preference to employees who were able to perform different functions. The Union was concerned that senior employees who had only performed one job for over 20 years would be adversely impacted by the “tiered” system. The second was the demand of the Company that employees begin paying a portion of their health insurance premiums after the first year of the proposed contract. Under the expiring contract, health insurance was provided by the Company, and there was no employee contribution.

The Union, by a vote of its members on March 4, rejected the Company proposal. The parties continued to negotiate and agreed upon an additional extension of the existing contract through March 18. On March 16, the Company presented a second proposal that was virtually identical to the first except for the health insurance. Although still providing that employees pay a portion of premiums after the first year of the contract, the provider was to be the Michigan Conference of Teamsters Health and Welfare Fund. This proposal was rejected on March 18.

On May 5, the Union struck. It is undisputed that this was an economic strike and that no replacements were hired. Supervisors and managers began performing production work. The parties continued to meet and bargain with the assistance of a federal mediator. They met one day each in June and July and again on August 23. The critical issues remained the tiered system and the demand that employees contribute to the cost of health insurance. The rejected March 16 offer was not withdrawn, and no written proposals were exchanged.

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[4] There are two units at the Hammond facilities. This proceeding relates to the production and maintenance unit: All full-time and regular part-time production employees employed by Respondent at its facility currently located at 1435 165th Street, Hammond, Indiana; excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

*B. Facts*

The contractual negotiators for the Company were Corporate Director of Human Resources Nancy Albert, who was the spokesperson, Regional Operations Manager Joseph Labus, and the Manager of Human Resources at Hammond Steve Navarro. An employee committee and Business Agents Larry Regan and Les Lis represented the Union. Those business agents reported to Secretary/Treasure Richard Knipp, the chief officer of the Union. Although Knipp did not regularly attend the bargaining sessions, Regan and Lis kept him advised of the progress, or lack thereof, at the sessions. Knipp and Arnold knew one another as a result of the longstanding bargaining relationship between the parties.

At the August 23 bargaining session, two changes of position occurred. The first related to the tiered system proposal. Knipp came to the meeting for a short period of time and met with the federal mediator and Arnold. Knipp stated that the Union would accept the tiered system if the Company would “grandfather” current employees during the term of the agreement being proposed so that any layoffs of current employees would be conducted by plant-wide seniority and would increase the Company pension contribution by four dollars a week to assure that employees with 30 years seniority would qualify for a full pension. Knipp was aware that the Union was, that day, proposing a less expensive health benefit plan, the savings from which could be used to partially offset the increased pension contribution. Albert stated that the Company would consider the foregoing proposal. Knipp and Albert agree that he noted that the Union’s rules prevented the members from revoting a rejected proposal, that “it was necessary to do something different to be able to take a proposal back … for another vote.”

The second change related to health benefits. The Company proposal of March 16 had provided, as requested by the Union, for health benefits through the Michigan Conference of Teamsters Health and Welfare Fund. The benefits were pursuant to what the parties referred to as the Key 2 option. On August 23, Business Agent Regan proposed the Key 3 option, a lower cost plan with higher deductibles. That option resulted in overall lower costs for the Company, savings that could be applied to the increased pension contributions that Knipp had requested.

At the August 23 session, the Union asked that the Company provide a “red line” copy of the proposed agreement reflecting deletions and additions to the current agreement. Later that day, this was formalized in a letter, signed by Business Agent Regan, that requested a copy of the Company’s “final proposal presented to the Union on March 16, 2006, in the form of the proposed new collective bargaining agreement. … Furthermore, the copy must specify any other deletions, modifications, amendments addendums or additions that complete the Company’s final intent on bargaining as presented to the Union on March 16, 2006.”

On August 28, Albert sent an e-mail to Knipp stating that the Company had “started today to put a red line copy of our offer together.” Albert noted that she was out of the office until September 2 and would “have a better sense of where we are next week when I return.”

On or about August 28, Albert sought detailed information from the Michigan Conference of Teamsters Health and Welfare Fund regarding the Key 3 plan. In the course of her discussions, she learned that the plan required a three year participation agreement. In the course of bargaining sessions that were held on September 18 and 19, the Union obtained a waiver of the three year requirement. The parties ultimately did agree to the Key 3 option, and the Union ultimately agreed that employees pay a portion of the cost of the health insurance premiums during the second and third years of the contract.

By an e-mail dated September 5, Albert advised the federal mediator that the Company was "currently working on the red line [copy] of our proposals," but noted that she would need to go over the proposal with Regional Operations Manager Labus who was "out this week" and that she would also be out and not return until September 17. No delivery date was stated. Despite the foregoing scheduling difficulties of the management officials, as hereinafter discussed, the Company thereafter committed to provide the red line copy by September 14.

On September 7, Knipp, who had been copied on the September 5 e-mail that Albert had sent to the mediator, wrote to Albert stating that the mediator had informed the Union that it could expect to receive a complete contract proposal "sometime around mid next week," noting that the Union understood that the proposal "may change in some areas because you are considering our proposal concerning the Michigan Conference of Teamsters Key-3 plan."

On September 8, the Union sent to the Company, by facsimile copy and e-mail, a letter stating that the Union was giving "notice that the striking workers will be returning to work unconditionally, effective immediately at 3:00pm this 8$^{th}$ day of September 2006." Shortly thereafter a number of the returning strikers and representatives of the Union appeared at the gate of the Hammond facilities. They were permitted to enter, and Knipp and Regan spoke with Manager of Human Resources Navarro. Although there is conflicting testimony regarding exactly what was said, the varying versions are immaterial. Navarro and Regan agree that, among whatever additional comments may have been made, Navarro stated that he would have to contact Nancy Albert. It is undisputed that it was near the end of the workday and that the employees were not permitted to return to work. The employees and union representatives were asked to leave the premises, and they did so without incident.

On September 11, the Company sent the Union a letter. As hereinafter discussed, its contents are critical to the issues herein. The letter, from Director of Human Resources Albert to Secretary-Treasurer Knipp states:

> I am in receipt of your correspondence dated September 8, 2006, by which you communicated the striking employees' unconditional offer to return to work effective 3:00 p.m. that date. Please accept this letter as formal notice that the Company shall not offer reinstatement to the striking employees until an agreement is reached. Accordingly, the Company is implementing a lockout effective immediately. The Company will provide its final written offer to the Union by the close of business, Thursday, September 14, 2006.

The final written offer, which the letter states would be provided by September 14, was not provided until the parties were adjourning on September 18, the first of two days of negotiations. Although the parties had been informally communicating regarding the Key 3 option of the Michigan Conference of Teamsters Health and Welfare Fund, and although the proposal of March 16 had contained the Key 2 option with that Fund, the September 18 proposal offered the Company health benefit plan contained in the expired agreement and which had been proposed in the Company's initial proposal of February 28 with, of course, the requirement for employee contributions. Article 29, relating to contract duration, left the effective date of the contract blank, whereas the March 16 proposal had provided for retroactivity with the effective date of the contract being March 1, 2006.

Both the Company proposal of September 18 and the September 20 proposal, to which the parties ultimately agreed, were presented with a cover sheet stating that the contract would be effective upon ratification until February 28, 2009, that there would be no retroactivity, that the modifications reflected in the red line copy related to the expired agreement and "Withdrawal of all outstanding NLRB charges and appeals." In the bargaining session on September 19, Business Agent Larry Regan asked Albert whether agreement to the proposal, the predicate for reinstatement of the striking employees, was contingent upon withdrawal. He recalls that Albert answered, "Larry, you know I cannot answer that." Albert testified that she replied, "Larry, you know I can't insist on that but we want this anyway."

Albert testified that, as of September 11, the March 16 proposal, which the Union had rejected on March 18, was on the table and could have been accepted. Contrary to that testimony, when asked, "At that time, what were the reasons that you had not, you were not in a position to immediately conclude a contract?" Albert answered that the Company was "working through the issues on the, the Michigan Conference … [which] required a three year participation agreement. And we weren't willing to do that." The foregoing answer establishes that the Company decision regarding no retroactivity had been made at least by September 11, otherwise a three year participation agreement would have presented no problem.

At negotiations on September 19, the Union advised the Company that it had obtained a waiver of the three year participation agreement from the Michigan Conference Fund. The Company, on October 20, submitted a proposal that provided for health insurance under the Michigan Conference Fund with the Key 3 plan that had first been proposed at the August 23 bargaining session, albeit with the objectionable requirement for employee contributions after the first year. The Company agreed to increase pension contributions which assured that employees with 30 or more years of service would qualify for full pensions. The cover sheet provided that the agreement would not be retroactive but would be effective upon ratification, and the effective date of the agreement in Article 29 was left blank.

On Saturday, September 23, the members of the Union ratified the proposed contract.

On Monday, September 25, at 7:57 a.m., Knipp sent an e-mail to Albert advising that the contract had been ratified and that Business Agent Regan had attempted, apparently unsuccessfully, to contract the Company in Hammond regarding a work schedule for "an orderly return to work."

On September 27, after making telephone calls to employees on September 25 and 26, the Company offered reinstatement to 41 striking employees, effective October 2. On that same date, September 27, the Company notified the remaining employees, approximately 22, that they were being laid off effective October 2. It is undisputed that, due to a decrease in production during the course of the strike, positions were not available for all strikers. The complaint does not allege any violation of the Act with regard to the layoff of the strikers for whom positions were unavailable.

Reagan testified that, at the ratification vote, he informed the employees, who had seen the proposal of September 20 with the cover sheet, to disregard the language relating to withdrawal of the NLRB charges.

The Union did not withdraw the charges. Neither Albert nor any other representative of the Company contacted the Union in that regard. On October 13, the Company filed a charge predicated upon the failure of the Union to withdraw the charges.

The letters of September 27 to the laid off employees state their entitlements, including unemployment compensation and health care benefits that "will be continued through November 4, 2006."

Director of Human Resources Albert learned from representatives of the Michigan Conference Fund that employees not actively working when the Michigan Conference Fund became the insurer were ineligible for continuation of benefits because they were not eligible for benefits unless actively working. The transition rules for the Michigan Conference Fund specifically provide that "no eligibility will be established for MCTWF benefits until the Employee returns to active employment."

By an undated letter, which Manager of Human Resources Navarro testified was sent on November 13, the laid off employees were informed that the September 27 letter was in error regarding the continuation of benefits, that because the laid off employees had "not returned to active employment" they were "not eligible for and were not receiving benefits at the time of … layoff … there are no benefits to continue pursuant to Article 18, Section 1(3) of the contract." That contractual provision states that "[c]overage of an employee who is laid off will be discontinued by the Company as of the end of the fourth week after the week in which such layoff occurs."

### *C. Analysis and Concluding Findings*

#### 1. The Lockout

The complaint alleges that the Respondent locked out the striking employees on September 11 at a time when the Respondent had made no complete contract offer and failed and refused to reinstate the striking employees to their former positions of employment upon their unconditional offer to return to work.

Three principles are applicable in addressing the foregoing complaint allegations.

The first principle, established in *Laidlaw Corp.*, 171 NLRB 1366 (1968), is that an employer's failure to reinstate striking employees to available positions upon their unconditional offer to return to work is inherently destructive of rights under that Act and, standing alone, violates Section 8(a)(3) and (1) of the Act. Due to a decrease in production, positions were not available for all strikers either on September 8 or 27, the date that reinstatement was finally offered, and the complaint herein alleges no violation with regard to the formal layoff of the employees for whom positions were not available. It is, however, undisputed that a significant number of positions were available. Replacement employees had not been hired.

The second principle, discussed in *Harter Equipment (Harter I)*, 280 NLRB 597 (1986), is that an employer is privileged to lock out employees in support of its bargaining position.

The third principle, and the principle critical to the decision in this case, is that, although an employer may lock out striking employees in support of its bargaining position and refuse to reinstate them immediately in response to an unconditional offer to return to work, it must make a "timely announcement to the strikers that it is locking them out in support of its bargaining position" and "clearly and fully … [inform them] of the conditions they must meet to be reinstated." *Eads Transfer*, 304 NLRB 711, 712 (1991); *Dayton Newspapers*, 339 NLRB 650, 656 (2003). In *Eads Transfer*, where there was no timely announcement, the Board explained that the rationale for the foregoing requirement is that "only after the employer has informed the strikers of the lockout can the strikers knowingly reevaluate their position and decide whether to accept the employer's terms." Id. at 712. In *Ancor Concepts, Inc.*, 323 NLRB 742 (1997), in which the employer stated that it would not offer reinstatement to the strikers "until a new agreement was reached," the Board held the notification to be timely and restated the principle that notification of the basis for the lockout was necessary "so that the strikers could fairly evaluate their bargaining position." Id. at 744. The principle relating to notification was refined in *Dayton Newspapers*, in which, although timely notification of the basis for the lockout was given, the conditions for ending it were not. The Board held that the strikers "must be clearly and fully informed of the conditions they must meet to be reinstated." Id. at 656.

In *Dayton Newspapers*, the employer argued that the Union had not agreed to various operational changes, but the Board found that the employer had not given the Union "a full and complete description of the changes that had been made." Id. at 657. The Board characterized the employer's actions as presenting the union with a "moving target" and held that the lockout was illegal, stating, in pertinent part:

> … [T]he Respondent failed to give the Union a clear set of conditions for reinstatement. … In short, the Respondent's conditions for reinstatement became a "moving target." Because the Respondent's demands were unclear, the Union was unable to intelligently evaluate its position, and therefore was powerless to end the lockout and obtain reinstatement of the [striking] drivers. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the locked-out drivers on and after December 27. Id. at 658.

Thus, although an employer may lock out its employees in support of its bargaining position, it is privileged to do so only if it gives notice that it is doing so and makes the union aware of the employer's bargaining position so that the union and strikers, as held in *Dayton Newspapers,* are "clearly and fully informed of the conditions they must meet to be reinstated. " This is necessary because, as held in *Ancor Concepts,* the Union and strikers must be able to "knowingly reevaluate their position and decide whether to accept the employer's terms."

In this case there was no "moving target." There was no target at all. Neither the Union nor the strikers knew the employer's bargaining position. The letter of September 11 gave notice that the Company was implementing a lockout and would "not offer reinstatement … until an agreement is reached" and that the Respondent would "provide its final written offer to the Union by the close of business, Thursday, September 14, 2006." In fact, the offer was not provided until September 18. No reference was made to the offer of March 16. As in *Dayton Newspapers*, "the Union was unable to intelligently evaluate its position, and therefore was powerless to end the lockout and obtain reinstatement" of the striking employees.

The Respondent, citing *West Co.*, 333 NLRB 1314, 1315 (2001), argues that its offer of March 16 was "on the table" at the time of the lockout because it was never specifically withdrawn nor did the parties "reasonably believe that the offer had been withdrawn." The General Counsel argues that the Respondent's arguments regarding the purported viability of the March 16 offer are made "in hindsight." I agree. That offer, although not formally withdrawn, did not represent the Respondent's current bargaining position in September, and the letter of September 11 did not state that its acceptance would end the lockout.

If the offer of March 16 had been the Respondent's bargaining position, the letter of September 11 would have so stated. When Albert was asked, "At that time [the day of the lockout] what were the reasons that you … were not in a position to immediately conclude a contract?" Albert answered that the Company was "working through the issues on the, the Michigan Conference … [which] required a three year participation agreement. And we weren't willing to do that." Insofar as the Respondent considered the offer of March 16 to have been open, Albert would have answered that the Respondent was in a position to immediately conclude a contract, and the letter of September 11 would have stated that fact.

The Respondent was not in a position to conclude a contract because the Respondent had decided not to offer a contract that would be retroactive. The March 16 proposal, Article 29, states the effective date of the contract to be March 1, 2006. Albert's testimony that the Respondent was unwilling to agree to a three year participation agreement establishes that, at least by September 11, the Respondent's bargaining position precluded retroactivity. If the March 16 offer had represented the Respondent's bargaining position, the three year participation agreement to which the Respondent was unwilling to agree would have presented no problem since the contract would have been effective retroactively to March 1, 2006, and would expire on February 28, 2009. The Respondent's decision not to offer retroactivity explains why the March 16 offer was not mentioned in the letter of September 11. The only offer stated in the September 11 letter was the "final written offer."

It is well settled that "a new offer … will end the power to accept the original offer …" Corbin on Contracts, Revised Edition, § 2.20 (1993). See also Restatement (Second) of Contracts, § 43 (1981). The Respondent's September 11 letter informs the Union that the employees will be locked out until the parties reach an agreement and that its "final written offer" will be forthcoming on September 14. In *Lincoln Hills Nursing Home*, 257 NLRB 1145 (1981), the Board affirmed the decision of the administrative law judge who held that there was no contract when the union accepted a prior offer after having been specifically informed that the company intended to "give another proposal" regarding wages. Id. at 1150, 1153.

So far as the Union was concerned, the March 16 offer had not been viable since its rejection on March 18. Knipp had informed Albert that the Union's rules precluded voting again upon a rejected proposal. Knipp, as of September 11, "never even knew if it [the March 16 offer] was still being offered." The letter of September 11 did not cite the March 16 offer as a condition for ending the lockout, and the "final written offer" had not been presented.

Whether the letter of September 11 effectively revoked the offer of March 16 is immaterial. Although, as the Respondent argues, the offer was not withdrawn, the absence of any contemporaneous mention of it by either party in the context of the September 11 lockout establishes that both parties reasonably believed that it was no longer viable. Consistent with *Lincoln Hills Nursing Home*, acceptance by the Union of any prior offer would have been a nullity because the Union had been informed that the Respondent was going to give another proposal. The March 16 offer did not represent the Respondent's bargaining position because, with no retroactivity, health coverage by the Michigan Conference Fund, which required a three year participation agreement, was precluded. The Respondent did not consider the March 16 offer to be viable, and that is confirmed by the fact that the letter of September 11 does not mention it. Thus, although the Respondent had made a complete contract proposal, that offer was not capable of acceptance as of September 11. The Respondent, by locking out its employees conditioned upon agreement to a contract at a time when it was not offering a contract capable of acceptance, violated Section 8(a)(1) and (3) of the Act.

Even if I were to have found that the March 16 offer was legally capable of being accepted, that offer did not reflect the Respondent's bargaining position as of September 11, and the Respondent did not inform the Union that acceptance of that offer would end the lockout. The Union was informed that reinstatement of the striking employees was dependent upon agreement to a contract, the "final written offer" of which would be presented on September 14. That final offer was not presented until September 18. Until that date, contrary to the requirement of applicable Board precedent, the Union and strikers were not "clearly and fully inform[ed] … of the conditions they must meet to be reinstated." *Dayton Newspapers*, supra at 656. In the absence of any other communication or the promised final offer, the Union and strikers were "unable to intelligently evaluate" their position. Id. at 658. Thus, even if it were to be found that the parties did not reasonably believe that the offer of March 16 had been withdrawn, the Respondent's lockout of the striking employees violated Section 8(a)(1) and (3) of the Act because the Union was not given "clear conditions for reinstatement." Ibid.

2. Withdrawal of Unfair Labor Practice Charges

The complaint, as amended at the hearing following the General Counsel's filing a notice of intent to amend dated June 22, 2007, alleges that the Respondent demanded that the Union withdraw unfair labor practice charges during an unlawful lockout and insisted that it agree to that permissive condition in order to end the lockout. The amendment was made following the filing by the Respondent of an amended answer on June 13, 2007, which pleads, as an affirmative defense, that the Union agreed to withdraw the unfair labor practice charges filed prior to September 26. The foregoing affirmative defense effectively presents again the claim of the Respondent, initially made in Case No. 13–CB–18511, filed on October 13, that the Union reneged upon an agreement to withdraw unfair labor practice charges. The Region dismissed the charge on the basis that such a demand was a permissive subject of bargaining. The Respondent appealed. The appeal was dismissed, stating that there was insufficient evidence that the Union had reneged upon an agreement.

There is no evidence that the Union agreed to withdraw any charges. The cover sheet on the proposals of September 18 and 20 stated that contract would be effective from ratification through February 28, 2009, that there would be no retroactivity, that the modifications reflected in the red line copy related to the expired agreement and "Withdrawal of all outstanding NLRB charges and appeals." The attached proposal of September 20, to which the Union agreed, reflected the modifications and left blank the date of ratification. It contained no provision relating to withdrawal of NLRB charges, a permissive subject of bargaining. There was no side letter.

"Neither party to a collective-bargaining relationship may condition agreement on the other side's withdrawal of a previously filed unfair labor practice charge." *Gloversville Embossing Corp*., 314 NLRB 1258, 1264 (1994), citing *John Wanamaker Philadelphia*, 279 NLRB 1034 (1986). Director of Human Resources Nancy Albert testified that, when questioned by Regan regarding the withdrawal condition on the cover sheet, she replied, "Larry, you know I can't insist on that but we want this anyway." It is well established with regard to permissive subjects of bargaining that "each party is free to bargain or not to bargain, and to agree or not to agree." *NLRB v. Borg-Wagner Corp., Wooster Division*, 356 U.S. 342, 349 (1958). Following the brief conversation in which Albert acknowledged that she was aware that the withdrawal condition was a permissive subject of bargaining, i.e., "we can't insist on that," the matter was never mentioned again. Neither party sought to bargain. No written agreement establishing a meeting of the minds was executed. The matter, following Albert's statement, was dropped.

In *Texaco Inc.*, 273 NLRB 1335 (1985), and *Texaco Inc.*, 291 NLRB 325 (1988), cited by the Respondent, there were signed strike settlement agreements in which the Union agreed, for "'various considerations' to withdraw the unfair labor practice charges." Id. 291 NLRB at 326, 337. In this case, withdrawal was not a term or condition of the contract and there was no strike settlement agreement. "Even when parties have successfully bargained about a permissive subject, a party may reject the bargain without violating Section 8(a)(5)." *Bricklayers*, 306 NLRB 229, 235 (1992). Insofar as a rejected agreement regarding a permissive subject is the basis for some undertaking by the other party, the other party is not held to its portion of the bargain. *Kent Engineering, Inc.*, 180 NLRB 86, 89 (1969). In this case, there was no undertaking by the Respondent based upon any purported agreement to withdraw charges, no consideration for any agreement to withdraw charges, and no agreement. If the Respondent herein genuinely believed that the Union had agreed to withdraw charges, it would not have recalled the employees on September 27 and returned them to work on October 2 without first confirming that the Union was fulfilling its obligations by withdrawing the charges. The fact that neither Albert nor any other representative of the Respondent contacted the Union regarding withdrawal confirms that the Respondent was aware that there had been no such agreement. The Respondent has not proved its affirmative defense of an agreement to withdraw charges.[5]

Likewise, there is no evidence that the Respondent unlawfully insisted that the Union agree to withdraw any charges. Although the Respondent did include the demand that the Union withdraw its unfair labor practice charges when presenting its offers on September 18 and again on September 20, it never insisted upon that condition. Business Agent Regan knew that the Respondent could not insist upon that permissive subject of bargaining. Whether, when he questioned Albert about the condition of withdrawal, she replied, "Larry, you know I cannot answer that," or as she recalled, "Larry, you know I can't insist on that but we want this anyway," is immaterial. Neither party sought to bargain after that conversation. The Respondent acted upon the Union's acceptance of the contract without regard to any agreement to withdraw the unfair labor practice charges. The Respondent, notwithstanding its unmeritorious affirmative defense that the Union agreed to withdraw the charges, did not unlawfully insist to impasse upon such an agreement. See *Detroit Newspapers*, 327 NLRB 799, 800 (1999). I shall recommend that this allegation be dismissed.

3. Discontinuation of Health Insurance

The complaint alleges that the Respondent unlawfully discontinued health insurance benefits to the employees for whom positions were not available and who were formally laid off on October 2.

Although the Respondent initially notified these employees that their benefits would be extended for four weeks after their layoff, this did not occur. Upon learning that employees who were not actively working were ineligible for benefits and, insofar as they were not receiving benefits those nonexistent benefits could not be continued, the Respondent advised the employees of its prior miscommunication.

The General Counsel argues that the Respondent "declined to pay for the laid-off employees' health insurance … because they had participated in the strike." I cannot agree. The Respondent and the Union entered into a contract which provides that health insurance will be provided through the Michigan Conference of Teamsters Health and Welfare Fund. The provisions of that fund state that "no eligibility will be established for MCTWF benefits until the Employee returns to active employment." As pointed out in the undated letter correcting the letter of September 27, employees not actively working were not eligible for benefits, thus, there was no coverage to continue. In applying that provision, the Respondent was complying with its legal obligations as established by the collective-bargaining agreement as well as the fund

[5] Insofar as any reviewing authority should determine that the Union's acceptance of the proposal of September 20 constituted an agreement to withdraw charges, notwithstanding Albert's acknowledgement that the Respondent could not insist upon that condition, the absence of any further discussion following her acknowledgement, and the absence of any written agreement establishing a meeting of the minds in this regard, I would find, consistent with *Bricklayers*, 306 NLRB 229, 235 (1992), that the Union was free to reject any such agreement and that noncompliance with any purported agreement constituted rejection.

agreement. Whether this constituted a change from past practice is immaterial. Eligibility for benefits was defined by the Fund, the provider designated by the parties in the collective-bargaining agreement. I shall recommend that this allegation be dismissed.

## Conclusions of Law

By failing to reinstate its striking employees following their unconditional offer to return to work on September 8, 2006, and by locking them out on September 11, 2006, without presenting the Union with a contract offer capable of acceptance or giving the Union clear conditions for reinstatement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

## Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent must make whole all strikers for whom positions were available as of their unconditional offer to return to work on Friday, September 8. Those strikers are the employees whose names appear with the shading emphasis on Respondent's Exhibit 12 and are named in my recommended Order. Insofar as is it undisputed that the offer to return occurred in midafternoon near the end of the workday and that the next regular workday was Monday, September 11, backpay will be computed from September 11 through October 2, or the actual date of reinstatement or refusal of offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I am mindful that offers of reinstatement for October 2 were made on or about Wednesday, September 27, and that October 2, the reinstatement date, would, in other circumstances, be a reasonable reporting date in relationship to that September 27 date; however, "a lockout unlawful at its inception retains its initial taint of illegality until it is terminated and the affected employees are made whole." *Movers and Warehousemen's Assn.*, 224 NLRB 356, 357 (1976). See also *Horsehead Resource Development Co.*, 321 NLRB 1406, 1415 (1996). In this case, there was an unlawful lockout on September 11 and no "substantial business justification" for refusing to offer reinstatement in response to the unconditional offer to return as of September 8. See *La Corte ECM, Inc.*, 322 NLRB 137 at fn. 2, 140 (1996). Thus, the granting of a "grace period" in which to arrange for reinstatement is inappropriate.

The Respondent must also post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

## ORDER

The Respondent, Dietrich Industries, Inc., Hammond, Indiana, its officers, agents,

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

successors, and assigns, shall

1. Cease and desist from

(a) Failing to reinstate to available positions its striking employees represented by Local No. 142, International Brotherhood of Teamsters, following their unconditional offer to return to work on September 8, 2006, and by locking them out on September 11, 2006, without presenting the Union with a contract offer capable of acceptance or giving the Union clear conditions for reinstatement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the following named employees for any loss of earnings and other benefits suffered as a result of the lockout following their unconditional offer to return to work in the manner set forth in the remedy section of the decision:

Fernando Vasquez
Rick Matlon
Ariel Diaz
Eugene Urbina
Pedro Moreno
Richard Harold Rodgers
Mark Shearer
Martin Hernandez
Louis Castaneda
Michael Brown
Ruben Valdez
Larry Wright
Darin W. Bensinger
Douglas Goodfellow
Terry P. Lush
Frank L. Lambert
Lloyd Davidson
Jefferey Cavins
Kenneth R. Berkley
Michael Speakes
Scott Hansen
Larry Ellis
Richard Slussar
David Stevenson
Ray M. Bilka
William Lambert
Phil Walma
Will McGaha
Kenneth Houlihan
John Saffa
Frank Azzolina
Greg Walker
Mark Zelesky
Theodore V. Kolivas
Kirk Stuhlmacher
Larry E. Stone
Richard Brambert
John Begley
Victor Muniz
Tom Suchala
Nick Brankowitsch

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Hammond, Indiana, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2006.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.     August 28, 2007

______________________
George Carson II
Administrative Law Judge

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

# APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail to reinstate you who are represented by Local No. 142, International Brotherhood of Teamsters, and who engaged in a strike, to available positions following your unconditional offer to return to work on September 8, 2006, by locking you out without presenting the Union with a contract offer capable of acceptance or giving the Union clear conditions for reinstatement.

WE WILL make whole those of you whose names appear below for any loss of earnings and other benefits suffered as a result of the lockout following your unconditional offer to return to work in the manner set forth in the remedy section of the decision.

Fernando Vasquez
Rick Matlon
Ariel Diaz
Eugene Urbina
Pedro Moreno
Richard Harold Rodgers
Mark Shearer
Martin Hernandez
Louis Castaneda
Michael Brown
Ruben Valdez
Larry Wright
Darin W. Bensinger
Douglas Goodfellow
Terry P. Lush
Frank L. Lambert
Lloyd Davidson
Jefferey Cavins
Kenneth R. Berkley
Michael Speakes
Scott Hansen
Larry Ellis
Richard Slussar
David Stevenson
Ray M. Bilka
William Lambert
Phil Walma
Will McGaha
Kenneth Houlihan
John Saffa
Frank Azzolina
Greg Walker
Mark Zelesky
Theodore V. Kolivas
Kirk Stuhlmacher
Larry E. Stone
Richard Brambert
John Begley
Victor Muniz
Tom Suchala
Nick Brankowitsch

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of your rights guaranteed by Section 7 of the Act.

DIETRICH INDUSTRIES, INC.
(Employer)

Dated __________________ By ________________________________________________
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

The Rookery Building, 209 South LaSalle Street, Suite 900, Chicago, IL 60604-1219
(312) 353–7570, Hours: 8:30 a.m. to 5:00 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (312) 353-7170